IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No. 75-5444

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SUPREME COURT, U.S.

EHRLICH ANTHONY COKER,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

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ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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EHRLICH ANTHONY COKER,

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v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF GEORGIA

BRIEF FOR THE RESPONDENT
IN OPPOSITION

STATEMENT OF THE CASE

Indicted for the offenses of armed robbery, rape, kidnapping, motor vehicle theft, and escape by a grand jury of Ware County, Georgia, Petitioner, Ehrlich Anthony Coker was tried before a jury and found guilty of each charge. Petitioner was sentenced to death on the charge of rape, life imprisonment on the charge of armed robbery, twenty years imprisonment for the offense of kidnapping, seven years imprisonment for the offense of motor vehicle theft, and five years imprisonment for the offense of escape.

On the evening of September 2, 1974, around 7:30 P.M. several inmates of the Ware County Correctional Institution attended a meeting of the Alcoholics Anonymous. Thirty or forty minutes after the meeting began, an inmate wielding a 5 or 6 pound steel bar engineered an escape on the part of three other inmates. The escaping inmates bored through a plywood ceiling, apparently with the above-mentioned steel bar, ran across the roof of the building to another building, and jumped off the latter building in an area not enclosed by the prison fence into the woods adjoining the prison grounds. One of the escaping inmates was the Petitioner, Ehrlich Anthony Coker.

On the same night of September 2, 1974, sixteen year-old Allen David Carver saw the Petitioner come through his back door, at Carver's home. At the time, young Carver was in the kitchen with his wife while his three week-old son was in the bedroom asleep. As the Petitioner entered Carver's house he swung a board over his head, ordered that, "nobody try anything," and commanded that the Carvers, (Allen and his wife, Elnita) go into the Carvers' bedroom. Young Allen Carver had immediately

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noticed that the Petitioner was in prison garb.

The Petitioner, Ehrlich Coker, then proceeded to have Elnita Carver tie her husband's hands and feet together with one of her blouses, and then Coker tied Carver to the shower rod in the bathroom. Coker changed into a pair of Carver's pants and inquired whether the couple had any cigarettes, a gun, anything to drink. Mrs. Carver gave Coker some iced tea, and, while in the kitchen, Coker turned out the lights and put a steak knife with a four-inch long blade under his belt.

Coker also took Carver's billfold, which contained $20.30, and the keys to the family car. The Petitioner then pushed the baby, who was asleep in his basinette throughout the incident, into the bathroom with the baby's father.

The Petitioner then ordered Elnita Carver, who was wearing a nightgown, to get dressed so that she could show the Petitioner how to start the family car. She asked whether she could go to the bathroom to change clothes, which request Petitioner Coker refused. Coker then gagged Allen Carver, still tied up in the bathroom, and raped Elnita despite having been told that Mrs. Carver was physically weak, from having recently left the hospital.

After the rape was completed, the Petitioner inquired and was told how to crank the Carvers' car. The Petitioner then left the house in the victim's car, holding Mrs. Carver at knife point and threatening to kill her if the police followed.

After Coker drove away with Mrs. Carver sitting beside him, Allen Carver managed to untie himself and call the police. A wide-spread search for the Petitoner and Mrs. Carver was immediately undertaken, and, a few miles outside of Waresboro, Georgia, an unmarked police car passed the Carver's automobile at a high rate of speed. Coker suspected that it was a police car and that a road block had been set up ahead. He turned off onto a dirt road, but the road came to a dead end, and Coker responded by backing the car around, stopping, and informing Mrs. Carver that they would wait on the road until the road block was lifted.

About ten minutes later, policemen found the Carver car with Petitioner and Mrs. Carver in it, and Ehrlich Anthony Coker was apprehended and arrested. From the resulting judgment of conviction and sentence of death, Petitioner Coker appealed to the Supreme Court of Georgia. The judgment of conviction and sentence of death were affirmed. Coker v. State, 234 Ga. 555, __ S.E. 2d __ (1975).

Additional facts will be developed subsequently, as necessary, for a more thorough illumination of any issue raised by Petitioner.

REASONS FOR NOT GRANTING THE WRIT

THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH IN THIS CASE WOULD NOT BE VIOLATIVE OF THE EIGHTH AMENDMENT PROHIBITION OF CRUEL AND UNUSUAL PUNISHMENT. (Question 1).

A. "Arbitrary Selectivity"

The thrust of Petitioner's argument "is that the arbitrary selectivity condemned in Furman v. Georgia, [408 U.S. 238 (1972)] has been carefully preserved in Georgia's modified capital procedures." Petition p. 27b. Inviting the Court to review this case, involving a statutory response to Furman permitting a modicum of discretionary sentencing, and in inviting the Court to review the"mandatory" (Petition, p. 28b) response to Furman evidenced by Dillard v. North Carolina, No. 73-6875, Petitioner has revealed his true argument; Petitioner would condemn both responses in that, in his view, both perpetuate the "arbitrary selectivity" condemned in Furman. The effect of the Petitioner's argument is to equate discretion in the execution of a capital statute, with the procedures which permit use of the death penalty in an arbitrary, rare, and discriminatory manner, contrary to the teaching of Furman v. Georgia, supra.

The Petitioner's argument erroneously assumes that Furman condemned discretion under the Eighth Amendment per se. In view of the fact that the justices of this Court comprising the majority in Furman expressly or implicitly relied on the "evolving standards of decency which mark the progress of a maturing society" [Trop v. Dulles, 356 U.S. 86, 101 (1958)], it would be anomalous if the capital punishment procedures permissible in the wake of Furman are procedures which must be void of any element of discretion. Indeed, in a prior opinion of the Court a majority, including Mr. Justice Brennan, Mr. Justice Marshall, and Mr. Justice Stewart, recognized that without the "link between contemporary community values and the penal system", provided by jury discretion, "the determination of punishment could hardly reflect those same 'evolving standards of decency.'" Witherspoon v. Illinois, 391 U.S. 510, 519 n. 15 (1968).

Respondent submits that, if the majority in Furman can be viewed as having agreed upon any single factor in rendering the sentences before them unconstitutional, then that factor was not discretion, but the discrimination presumed to have tainted the exercise of that discretion.

It should also be observed that there is absolutely nothing in the record sub judice to indicate that the discretion permitted by Georgia Laws 1973, pp. 159-172 has been discriminatorily exercised. The historical approach followed by some of the majority in Furman in reliance upon empirical evidence outside the record is precluded

sub judice, for the procedures sub judice are a break with the past. To invalidate the statute under review, the Court would have to hold that the discretion permissible under the statute is so broad as to infect it with an impermissible potential for arbitrary action, a potential so likely to become realized as to justify the Court in quelling it even in the absence of proof of discrimination. While statutes have often been voided under similar circumstances in First Amendment cases [exemplified by Lovell v. City of Griffin, 303 U.S. 444 (1938); cf., Mills v. Alabama, 384 U.S. 214 (1966)], where freedoms vital to our self government were at stake, there is no precedent for taking such a course in a case arising under the Eighth Amendment.

Precluding a jury from exercising a contrclled discretion as provided for in the statute under review would foster the creation of a draconian system with no capacity for mercy. The Court, however, has only recently reaffirmed a rejection of the notion that "every offense in a like legal catagory calls for an identical punishment without regard to the past life and habits of a particular offender." Williams v. Illinois, 399 U.S. 235, 243 (1970), quoting Williams v. New York, 337 U.S. 241, 247 (1949). Surely, the Eighth Amendment is broad enough to encompass the exercise of controlled sentencing discretion, for even the dissenters in Furman ". . . could more easily be persuaded that mandatory sentences of death, without the intervening

and amelioratory impact of lay jurors, are so arbitrary and doctrinaire that they violate the Constitution." Furman v. Georgia, supra, at 402.

As written and construed, Georgia procedures satisfy the criteria delineated above. Under the 1973 statute, once guilt is determined on a capital charge, there are ten statutory aggravating circumstances," one of which, at least, must be present beyond reasonable doubt before death can be imposed." Ga. Laws 1973,pp. 159, 162, 164-166, 170-171, amended, in part, without material change, Ga. Laws 1974, pp. 352, 355-358 [Ga. Code Ann. §§26-3102, 27-2503,(formerly 2534.1), -2534, -2537 (Supp. 1974)]. The statutory aggravating circumstance is a procedural prerequisite to death sentence imposition, its presence beyond reasonable doubt does not mandate a death sentence.

If death is imposed, there is a second level set of guidelines by which the Supreme Court of Georgia reviews the sentence. Ga. Code Ann. §27-2537, supra. Like the statutory aggravating circumstance at the trial level, these standards of review place procedural barriers in the way of imposition of death, not the non-imposition. The precise issue, then, which Petitioner would place before the Court is whether the Eighth Amendment forbids the Georgia statute, whose discretionary guidelines control the imposition of death with clear and objective standards but at no point require a death sentence.

Review for disproportionality has resulted, for all practical purposes, in elimination of the death sentence for armed robbery. Floyd v. State, 233 Ga. 280 __ S.E.2nd __ (1974); Gregg v. State, 233 Ga. 117, __S.E. 2nd __ (1974). Rape and probably kidnapping will require particularly pathetic circumstances. Compare Coley v. State, 231 Ga. 829, 204 S.E. 2nd 12 (1973) with Eberheart v. State, 232 Ga. 247, 206 S.E. 2nd 12 (1974). The classic death sentence will be one for senseless murder. See eg., Gregg, supra; House v. State, 232 Ga. 140, 205 S.E. 2nd 217 (1974).

Respondent respectfully suggests that the holding in Furman may be stated as the following, constitutionally required result under any capital procedure: Isolated defendants cannot be sentenced to die on the basis of chance or arbitrariness or social attitudes. A death statute must be applied under limited, objective circumstances defined by a rational relation between the nature and degree of the crime involved, and, the maximum sentence which can be imposed. A review of the aggravating circumstances contained in the Georgia death statute show that each and every aggravating circumstance delimits the reasoned judgment of jurors to imposition of the death penalty only where a crime falls under the following three simple catagories:

(1) The crime under review is particularly heinous or wanton, vicious and without rational provocation.

(2) The crime under review is committed for a "cold-blooded" and callous purpose by a person obviously lacking in regard for human life.

(3) The crime under review involves the murder of a person whose duty is criminal deterrence.

The Georgia statute also involves two separate but important catagories; These are treason and the commission of a capital felony by a repeat capital felony offender. The imposition of the death penalty for the crime of treason is self-explanatory even under federal law, however, the last catagory is the subject of the following subsection.

B. Excessiveness

Petitioner argues that "the punishment of death is excessive, disproportional, and aberrational for rape and kidnapping." Petition, p. 29b. Petitioner does not distinguish between those rapes that, because of the victim's fear or threat of harm by the attacker, involve no more physical force that an ordinary act of sexual intercourse and those rapes that can only be discribed as heinous, vicious, or atrocious. Compare Coley v. State, supra, with Eberheart v. State, 232 Ga. 247 (1974); McCorquodale v. State, 233 Ga. 369 (1975).

However, in the case sub judice, although the Petitioner committed the crime of rape under two of the statutory aggravating circumstances, the Respondent concedes that there was nothing particularly heinous or vile about the crimes for which the Petitioner was convicted. Nevertheless, this Court cannot possibly overlook the fact that for the Court to legislate that the State cannot impose the death penalty upon an individual who had been previously been convicted for murder, rape and kidnapping in two different situations, in addition to being an escapee from a prison at the exact time of the commission of the crime in the case sub judice [two different aggravating circumstances], would be to trod so heavily upon states' "police powers" as to facilitate the earlier referred to creation of draconian system with no capacity for mercy.

II. THE ISSUE OF WHETHER THE APPELLATE REVIEW MECHANISM OF GA. LAWS 1973, PP. 159-172 (GA. CODE ANN. §27-2537) DEPRIVED THE PETITIONER OF DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW, AS WELL AS THE EFFECTIVE ASSISTANCE OF COUNSEL, HAS NOT BEEN SEASONABLY PRESENTED TO THE SUPREME COURT OF GEORGIA. (Question 2).

As noted previously, Petitioner attacks Ga. Laws 1973, pp. 159-172 on the basis of a perceived unconstitutionality of the statute under Furman v. Georgia, 408 U.S. 238 (1972). In arguing that the statute is plagued with "arbitrary selectivity" Petitioner, in fact, has argued that the appellate review mechanism provided for under the statute does not ameliorate what Petitioner perceives to be an otherwise arbitrary statute subject to condemnation under Furman; indeed, argues Petitioner, the review mechanism results in "a perpetuation of the Eighth Amendment arbitrariness condemned by this Court on June 29, 1972." Petition, p. 22b. The second issue raised by Petitioner, however, exceeds the "perpetuation" attack and asserts that the review mechanism fosters constitutional deficiences separate and apart from asserted Eight Amendment prohibitions against capital punishment.

The question of whether the appellate review mechanism separate and apart from any asserted deficiencies under Furman, deprives the indigent capital defendant of due process and equal protection under the law, as well as the effective assistance of counsel, has not been presented to the Supreme Court of Georgia. For purposes of review in this Court, Petitioner's attempt to raise a federal question in this Court is untimely. See Bohannan v. Arizona, 389 U.S. 1 (1967); Herndon v. Georgia, 295 U.S. 441 (1935); Jett Brothers Distilling Company v. Carrollton, 252 U.S. 1 (1920); see also Miller v. California, 413 U.S. 15, 34 n. 14 (1973); Hanson v. Denckla, 357 U.S. 235, 243-244 (1958).

The second question framed by Petitioner is not ripe for consideration by the Court.

III. THE PETITIONER WAS AFFORDED, IN THE STATE TRIAL COURT, A FULL AND ADEQUATE HEARING ON THE ISSUE OF HIS COMPETENCE TO STAND TRIAL IN ACCORDANCE WITH FEDERAL AND CONSTITUTIONAL DUE PROCESS STANDARDS. (Question 3).

The Petitioner contends that "The present case presents an important procedural question left unanswered by 'Pate' and 'Drope': Is a hearing 'adequate' to determine competence when the State introduces no expert testimony and when the court-appointed psychiatrist who has interviewed the defendant is unable to give a medical opinion as to the defendant's competence because further examination is necessary?" An examination of the record in the case sub judice and the constitutional authority cited by the Petitioner will make clear that no such "procedural question" is relevant to this Court's review of this case.

In a word, the facts of the case sub judice, along with presently existing state and federal law governing findings on a defendant's competence to stand trial render unnecessary this Court's delimiting the holding in Drope v. Missouri, __ U.S. __, 43 L. Ed. 2d 103 (1975) and Pate v. Robinson, 383 U.S. 375, 15 L.Ed. 2d 815, 86 S. Ct. 836 (1966).

Prior to the trial of the Petitioner on the charges for which he was convicted and sentenced, the Petitioner entered a special plea of insanity on which a hearing before a jury was held

in order to determine the Petitioner's competence to stand trial. The special plea of insanity is provided by Ga. Code Ann. §§27-1502, 1504 whenever the defense or the State contends that a given accused is incompetent to stand trial. In Georgia, the test of competency to stand trial is simply whether or not the defendant is mentally capable at the time of trial of understanding the proceedings against him, of comprehending the defendant's condition in reference to such proceedings, as well as the defendant's capacity to render his attorney such assistance as a proper defense to a criminal accusation demands. Brown v. State, 215 Ga. 784 (1), 113 S.E. 2d 618 (1960). It is clear that such a test essentially involves a finding of fact.

At the hearing on the Petitioner's special plea, the Petitioner testified. His testimony was intelligent and responsive to questions asked on both direct and cross-examination. The Petitioner remembered dates and events occurring before and after the crime for which he was convicted, facts involving his personal history, people with whom the Petitioner had contact pursuant to his arrest, etc. Undoubtedly, no single factor was as convincing of the Petitioner's capacity to ably assist in his defense than Petitioner's own testimony.

The court-appointed psychiatrist who examined the Petitioner was of the opinion that latent mental disorders were in fact indicated. The psychiatrist discussed generally, deficiencies in the Petitioner's psychological dynamic, but was unable to arrive at a conclusive diagnosis of the Petitioner's mental condition. However, a reading of the transcript of the special plea hearing will show that on direct examination, the psychiatrist was questioned basically in regard to the Petitioner's capacity to distinguish "right from wrong" in the context of the crimes committed by the Appellant.

Notwithstanding the irrelevance of the Petitioner's moral knowledge regarding crimes which he had committed or was capable of committing, the psychiatrist testified that the Petitioner knew who he was, knew who the psychiatrist was, knew who the Petitioner's attorney was, knew why the psychiatrist was examining the Petitioner, and knew the legal consequences of the crimes for which the Petitioner was charged.

In addition, the Warden wherein the Petitioner was housed prior to Petitioner's escape and subsequent criminal venture, as well as the prison paramedic testified that the Petitioner seemed to them as normal as "any other inmate". Upon submission of the evidence to the jury, the jury found the Petitioner competent to stand trial.

Pate v. Robinson, supra, and Drope v. Missouri, supra, are cases which deal with circumstances under which an accused is entitled to a hearing on the issue of competence to stand trial. Both cases involve situations where in one measure or another such a hearing was denied the accused in those cases. Although Pate and Drope do not clearly delineate evidentiary factors in determining competence to stand trial such as the burden of proof, the quantum of expert evidence required, or the weight of a given expert versus lay evidence, both cases acknowledge the need for the exercise of sound discretion and scrupulous examination on the part of the finder of fact.

In Drope v. Missouri, supra, it was held:

"The import of our decision in Pate v. Robinson, is that evidence of defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of

manifestations and subtle nuances are implicated. That they are difficult to evaluate is suggested by the varying opinions trained psychiatrist can entertain on the same facts."

The above-quoted dicta of this Court was aimed at the same considerations bearing on the case sub judice. The Petitioner was afforded a hearing involving the testimony of a psychiatrist, lay witnesses, and the Petitioner himself. The trial judge had the opportunity to observe the demeanor of the Petitioner during the pre-trial hearing.

Notwithstanding the many factors which must be taken into account in any determination of the competence of an accused to stand trial, the Petitioner would have this Court consider legislating a rule to be applied to the State such that when the State introduces no expert testimony and no psychiatrist is able to give a complete medical opinion as to the sanity of the accused, the accused has not had an adequate hearing to determine his competence to stand trial. Not only would such legislation do nothing towards guaranteeing the competence of defendants at their trials, but to so legislate would be an exercise in administrative and factual discretion not of constitutional dimension. Compare 18 U.S. Code Ann. §4244; United States v.

Huff, 409 F. 2d 1225, cert. den. 396 U.S. 857, 90 S. Ct. 123 (1969); Wolcott v. United States, 407 F.2d 1149, cert. den. 90 S. Ct. 156, 396 U.S. 879 (1969); United States v. Muncaster, [D.C. Ala.] 345 F. Supp. 970 affd. 472 F.2d 1407, cert. den. 93 S. Ct. 3021, 412 U.S. 963 (1972).

Essentially, the only distinction in practice between the Georgia procedure for determining competence to stand trial and the Federal procedure is the more liberal Georgia right to a jury trial on the issue. Moreover, as can be seen from the record to the case sub judice, the Petitioner can show no violation of his right to due process of law. Pate v. Robinson, supra; Drope v. Missouri, supra.

IV. THE MERE FORM OF THE RECORD OF THE VOIR DIRE, WHICH FORM INDICATED THAT NO JURORS WHERE EXCLUDED FROM THE PANEL ON THE GROUND OF CONSCIENTIOUS OBJECTION TO THE DEATH PENALTY, IS A MINISTERIAL ISSUE AND NOT OF CONSTITUTIONAL DIMENSION. (Question 4).

Before the trial of the case sub judice, the court reporter omitted to record the voir dire of the jury except as to objections raised by counsel. Counsel for the Petitioner did pose an objection during voir dire to the effect that the District Attorney should not pose any further question regarding conscientious scruples against capital punishment.

Of course, proceedings pursuant to a trial are normally recorded by a court reporter. However, in the case sub judice the clerk of the court compiled a list of the jury panel and of those jurors struck either peremptorily or for cause. The list showed that no jurors were struck for cause of any kind.

Indeed, the Petitioner does not assert that jurors were struck from the panel because of conscientious scruples against the death penalty in contravention of Witherspoon v. Illinois, 391 U.S. 510 (1968). Instead, the Petitioner simply seeks to obtain a reversal of his convictions on a fabricated technical ground couched in terms of the Sixth Amendment confrontation clause.

In essence, then, the fourth question presented for review by this Court merely presents an issue of Georgia appellate practice wherein records on appeal can be supplemented as an administrative function. However, unless such supplements to records are unquestionably reliable, they are not allowed. Owens v. State, 233 Ga. 869 (1975).

In effect, the Petitioner's argument is tantamount to complaining because the Petitioner himself was not present at oral argument before the Supreme Court of Georgia on appeal to that court. Coker v. State, 234 Ga. 555 (1975).

In Draper v. Washington, 372 U.S. 487, 9 L. Ed. 2d 899 83 S. Ct. 744 (1963), the Court reviewed the adequacy of substitute transcripts to be provided for indigent defendants where the State chose to avoid the expense of transcribing a full trial. Although the context of the aforementioned case is different, the technical rule is the same:

> "Alternative methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of the events at trial in which the Appellant's contentions arise. A statement of facts agreed to by both sides, a full narrative statement based perhaps on the trial judge's

> minutes taken during the trial or on the court reporter's untranscribed notes, or a bystander's bill of exceptions might all be adequate substitutes, equally as good as a transcript." Draper v. Washington, supra, [at p. 495].

Little is required to point out that a defendant's Sixth Amendment right to confrontation of accusers could not possibly be violated where, at a hearing, the only individuals to be confronted are judges, clerks, court reporters, attorneys or Supreme Court Justices. Such a hearing has nothing to do with the crimes for which the Petitioner was convicted.

The Respondent submits that the Petitioner's question number 4 presented for review is patently unmeritorious.

CONCLUSION

The Court should refuse to grant the writ of certiorari because no sufficient reason for review has been set forth by the Petitioner.

Respectfully submitted,

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